NO. 18801 ✓

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. BURGE,	)
	)
Appellant,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF ALASKA

BRIEF FOR APPELLANT

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On November 4, 1960, the grand jury filed in the District Court for the District of Alaska, at Fairbanks, an indictment charging Richard W. Burge with violations of the law concerning the traffic of illegally imported narcotic drugs (Sec. 174, Title 21, USC) as follows:

"Count I of the indictment charges:

That on or about the 23rd day of April, 1959, at Fairbanks within the District of Alaska and within the judisdiction of this Court, Richard W. Burge did knowingly receive, sell and facilitate the sale of a narcotic drug, to-wit, heroin, to Hazel Geary after it being imported or brought into the United States, the said Richard W. Burge knowing the heroin to have been imported or brought into the United States contrary to law all in violation of 21 U.S.C.A. 194."

"Count II of the indictment charges:

That on or about the 23rd day of April, 1959, at Fairbanks within the District of Alaska and within the jurisdiction of this Court, Richard W. Burge did knowingly conceal and facilitate the transportation of a narcotic drug to-wit, heroin after it being imported or brought into the United States; the said Richard W. Burge knowing the heroin to have been imported or brought into the United States contrary to law, all in violation of 21 U.S.C.A. 174."

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Title 18, U.S.C., Sec. 231, and Title 48, U.S.C., Sec. 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of Title 28, U.S.C., Secs. 1291, 1294.

STATEMENT OF THE CASE

Richard W. Burge, the appellant, had been employed and living in Anchorage, Alaska during the time relevant to the events leading up to this case (Tr. 257). He had come to Fairbanks on the 18th of April, 1959, to institute a business venture with one Arthur Bell; some sort of cardroom (Tr. 266).

Burge accepted a room in a two bedroom dwelling house at 774 17th Street, Fairbanks, rented and partially occupied by one Dolores Jean Wright (Tr. 98). He became associated, at a party on the night of April 20, 1959, with one Hazel Geary (Tr. 15-17, 46-49, 261-263).

From approximately noon on the 23rd of April, 1951, there were present at the premises at 774 17th Street, on various occasions and in various combinations, Burge, Arthur Bell, Dolores Jean Wright, Hazel Geary, and at least two taxicab drivers (Tr. 28-30, 229-232, 274-286). At approximately 7:20 P.M., Wright, Geary and Burge left the house in Burge's auto. After dropping Miss Wright off at a nearby beauty shop, Burge drove to the vicinity of the Idle Hour Cafe, several blocks from 774 17th Street, and parked his auto (Tr. 30-31). At approximately 7:30 P.M., Burge and Geary were arrested at the Idle Hour Cafe, purportedly upon information from Geary that a pre-arranged purchase of narcotics from Burge had been effected (Tr. 31). Dolores Jean Wright was arrested shortly thereafter, at the beauty parlor (Tr. 94).

Burge was subsequently indicted under Title 21, U.S.C., Sec. 174, and charged in two counts with dealings in the traffic in illegal narcotics. Count I charged that he "did knowingly receive, sell and facilitate the sale of a narcotic drug, to-wit heroin, to Hazel Geary". Count II charged that he "did knowingly conceal and facilitate the transportation of a narcotic drug, to-wit, heroin".

The account of the events of April 20-23, upon which the United States proceeded, was gleaned mainly from the accusations of Geary. She testified to the following: Burge first approached her with a proposal to "dump a large quantity of heroin" on April 20 (Tr. 15). She demanded a sample before she would do business on a larger scale (Tr. 17). She then went to officers Barkley and Calhoon for money to purchase her sample (Tr. 18, 19). She then proceeded to make her "buy" (Tr. 20). The officers did not see fit to move in and make an arrest when Geary asserted the "buy" had been made; they merely took her "outfit" and planned a bigger "buy" with her (Tr. 23).

On the 23rd of April, Geary was given $400.00 in marked bills (Tr. 24). She proceeded first to the Model Cafe for about a half hour, and then on to 774 17th Street, arriving there about 1:30 P.M. (Tr. 24, 25). She testified that Burge asked her to see her money, made trips about the house and away in his car, and finally appeared with two glass jars (heroin and milk sugar) and "cut" the heroin on front of

his prospective customer (Tr. 25-27). He then sold her this mixture in a prophylactic (Tr. 27). This sale is supposed to have taken place about 2:30 P.M. (Tr. 27). Though Geary was supposed to have given a visual signal to police as soon as possible after the "buy" (Tr. 54-55), she continued in the house watching TV (Tr. 29), and eating snacks (Tr. 28) until about 7:15 P.M.; then, upon leaving, gave no signal which could be detected by police (Tr. 30).

Police had 774 17th Street under surveillance throughout all this time (Tr. 229-230), and the Burge car as well (Tr. 230). After the arrests they moved in to search 774 17th Street, upon the alleged "consent" of Dolores Jean Wright. They found a jar of milk sugar (Tr. 131), but no jar of heroin. Though Geary surrendered the heroin she claims to have bought (Tr. 32-33), no narcotics were found in Burge's possession or in his auto (Tr. 202-205), nor was there any evidence of marked money, at this time.

Though Geary admittedly had been convicted of a felony (Tr. 39-40), charge were presently pending against her for forgery (Tr. 39-40) and for this narcotics violation, and she was admittedly an addict (Tr. 33, 34) and a prostitute (Tr. 38), the prosecution did not call Dolores Jean Wright, whose direct testimony could not be impeached for her complicity in the alleged crime. Jackie Bell, the other person conspicuous by his presence at 774 17th Street throughout much of the afternoon, disappeared and could not be found.

The marked money was found seven days after the arrests took place, in a space behind the headlight section of Burge's car (Tr. 235-237). An anonymous source of information is said to have been the clue as to where to look for the money (Tr. 235).

As to Count I of the indictment, the plaintiff offered: The testimony of Geary of two consummated purchases of narcotics from Burge, as a police informant (Tr. 20, 27-29); some corroboration by police officers of her status as an informant (Tr. 133-137, 228-229); testimony by police officers of access of Burge to Geary on the day of the arrest; a hypodermic needle and eyedropper evidencing a trace of narcotic received from Geary, constituting Exhibit A (Tr. 83); a small plastic bottle, the contents of which were identified to be heroin and milk sugar, received from Geary and constituting Exhibit B (Tr. 84-85); a white jar recovered from the medicine cabinet in the bathroom of the premises at 774 17th Street, evidencing a fingerprint identified as that of the accused, the contents of which were identified to be milk sugar, constituting Exhibit C (Tr. 86, 165-166); an eyedropper and a needle evidencing a trade of narcotic, obtained from the medicine cabinet in the bathroom of the premises at 774 17th Street, constituting Exhibit D, but later stricken (Tr. 130, 167-168); money obtained from a space behind the headlight section of the auto belonging to Burge, identified as having been marked by police and given

to Geary to effect a purchase of narcotics (Tr. 236-237); and testimony of access by Burge to the front portion of his auto on the day the sale is asserted to have taken place (Tr. 190-191, 207-208). Mr. Burge freely admitted association with Geary on the day of the arrest (Tr. 272-286), but denied any knowledge of the presence of narcotics (Tr. 271, 229-302), or of dealings therein (Tr. 264, 271, 291, 299-302); or of the presence of milk sugar (Tr. 297); or of any large amount of money in the possession of Geary (Tr. 291); or of any access to the front section of his auto, except in the company of a service station attendant (Tr. 278-279).

The plaintiff offered no evidence in support of Count II, except that to be implied from the evidence offered in support of Count I, and unless the transporting of Geary to the point at which she was arrested and found to be in possession of a substance identified as heroin, could be said to be evidence of facilitating the transportation of narcotics.

At the close of plaintiff's evidence, defendant's motion for judgment of acquittal was denied. At the close of all the evidence, defendant's renewed motion for judgment of acquittal was denied.

As to Count I, the jury could not reach a verdict. As to Count II, the jury found the defendant had knowingly concealed and facilitated the transportation of a narcotic drug.

After judgment and sentence, this appeal followed.

STATEMENT OF POINTS

1. The Court erred in refusing to suppress Exhibits "C" and "D", being articles obtained from an unlawful search of the premises at 774 17th Street. Exception was taken.

2. The Court erred in admitting Exhibits "C" and "D" into evidence, the same being articles obtained from 774 17th Street by means of an illegal search and seizure. Exception noted.

3. The Court erred in finding that consent had been given, voluntarily, to the search of 774 17th Street by Dolores Jean Wright. Mere acquiescence is not consent. Exception was taken.

4. The Court erred in denying defendant's motion to suppress certain evidence, made in advance of trial.

5. The Court erred in admitting Exhibit "D" into evidence, there being no evidence whatever connecting said exhibit with the defendant. The action of the Court in withdrawing this exhibit in the closing minutes of the trial could not cure the error. Exception was taken to the admission of this exhibit.

6. The Court erred in instructing the jury as it did in Instruction No. 9. There was no evidence in the record covering the factual situation contemplated by this instruction, and the giving of the instruction was bound to have the effect of confusing the jury. Exception taken.

7. The Court erred in instructing the jury as it did in Instruction No. 10. There was no evidence whatever that the defendant had ever exercised any "constructive possession" of

the narcotic in question, nor was there any evidence whatever that the alleged possession of the defendant was "joint". There was no evidence that two or more persons in the case had shared either actual or constructive possession of the narcotics. Under the circumstances, the giving of this instruction was bound to confuse the jury. Exception noted.

8. The Court erred in instructing the jury as it did in Instruction No. 12. No question of intent was involved in the case. Exception was taken to the giving of this instruction.

9. The Court erred in instructing the jury as it did in Instruction No. 13. No question of intent was involved in the evidence. Exception was taken to the giving of this instruction.

10. The Court erred in instructing the jury as it did in Instruction No. 21. This instruction invites the jury to disregard the testimony of the defendant completely. Exception was taken to the giving of this instruction.

11. The Court erred in denying defendant's motion for judgment of acquittal, made at the close of the evidence offered by the Government.

12. The Court erred in denying defendant's renewed motion for judgment of acquittal, made at the close of all the evidence.

13. The verdict on Count II of the indictment is contrary to the weight of the evidence.

14. The verdict on Count II of the indictment is not supported by substantial evidence.

15. Other manifest error appearing of record, to which objection was taken and exception reserved.

SUMMARY OF ARGUMENT

Though the record of the trial covers 328 pages, the plaintiff's case is based primarily upon the testimony of an informant, Hazel Geary. Her direct testimony covers only about 20 pages. All other evidence offered by the plaintiff is circumstantial and seeks to corroborate the testimony of Geary. It is our contention that most of this circumstantial evidence was received in violation of the defendant's right of privacy, as secured against unreasonable searches and seizures by the United States Constitution. We further contend that certain instructions given to the jury, over the objection of the defendant, were so far removed from the evidence and issues of the case as to mislead and confuse the jury, rather than to put the evidence in proper perspective with respect to the crimes charged. Finally, it is our contention that all the evidence offered by the plaintiff, when properly evaluated, was insufficient to permit a jury determination of the fact of guilt.

During the trial, we contend that the court committed reversible error in the following particulars:

1. The Court erred in admitting Exhibits C and D, and the testimony relating thereto, into evidence, in that as items obtained in an unlawful search of the premises at 774 17th Street, Fairbanks, Alaska, they were not admissible against the defendant.

2. The Court erred in admitting Exhibit E, and the testimony related thereto, into evidence, in that as an item obtained in an unlawful search of the defendant's automobile, it was not admissible against him.

3. The Court erred in admitting Exhibit D into evidence, there being no evidence offered to link the items to the defendant or to the crime charged; under the circumstances of this case, the subsequent withdrawal of this evidence from the jury did not cure this error.

4. Certain instructions given by the Court were so far unrelated to the issues and the evidence of this case as to confuse and mislead the jury. When considered collectively, these erroneous instructions invited a conviction on evidence which was not sufficient in law to constitute a crime under Title 21, Sec. 174.

5. The Court erred in giving its instruction respecting the credibility of the defendant's testimony. The tendency of the instruction to single out and discredit this testimony exceeded the boundaries of fair comment on the evidence properly within the province of the trial judge.

6. The Court erred in denying defendant's motion for judgment of acquittal made at the close of plaintiff's case, and renewed at the close of all the evidence. A review of the evidence reveals that a proper evaluation of the evidence establishes its inadequacy to foreclose a reasonable doubt of defendant's guilt, and the question should not have been submitted to the jury.

ARGUMENT

I. THE COURT ERRED IN ADMITTING EXHIBITS C AND D, AND THE TESTIMONY RELATING THERETO, INTO EVIDENCE, IN THAT AS ITEMS OBTAINED IN AN UNLAWFUL SEARCH OF THE PREMISES AT 774 17th STREET, FAIRBANKS, ALASKA, THEY WERE NOT ADMISSIBLE AGAINST THE DEFENDANT.

A. THE GOVERNMENT HAS NOT MET THE HIGH BURDEN OF ESTABLISHING THAT "CONSENT" TO A SEARCH WITHOUT WARRANT WAS GIVEN BY DOLORES JEAN WRIGHT.

During the course of the trial, two exhibits were admitted into evidence which had been obtained as a result of a search of the premises at 774 17th Street. These items consisted of Exhibit C, being a glass bottle containing a material identified as milk sugar, and Exhibit D, being a eye dropper and a hypodermic needle. Both items were allegedly taken from the bathroom of the house. At a later point in the proceedings, and before the case went to the jury, the court reversed the field as to the admission of Exhibit D, holding that the evidence failed to link this material to the defendant in any way, and the jury was instructed to disregard Exhibit D. Exhibit C, on the other hand, remained in evidence and may very well have been an important consideration to the jury, as it was connected to the defendant by testimony that his fingerprint was found on the bottle. The witness Geary had testified that a similar bottle had been used in the course of mixing the heroin which she purchased from the defendant. Thus, this item of evidence was vital to the government's case and was emphasized by the government in closing argument.

Both Exhibits C and D were the products of an unlawful search of the premises at 774 17th Street, and should have been excluded from the evidence. Admittedly, the search of 774 17th Street was made without a search warrant, although the officers testified that they had the premises under surveillance at all times and could have easily delayed the search until a proper warrant had been obtained. The 4th Amendment to the Constitution of the United States provides:

> "The right of the people to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly in describing the place to be searched and the persons or things to be seized."

Having no search warrant, therefore, the search in question was obviously unlawful unless some other fact could be found to establish its legality.

In this respect, the government relied upon "consent" to the search, allegedly given by Dolores Jean Wright at about 10:00 o'clock on the evening of the arrests. In this connection, it should be noted that the alleged oral "consent" was given by Miss Wright to two law officers at a time when she was under arrest, charged with the illegal possession of narcotics, confined at the Federal Building without an opportunity to consult counsel or anyone else. It is highly significant that, a few minutes later, when an attempt was made to get Miss Wright to sign a written consent for search, she refused to do so. (Tr. 103).

The only testimony material to the question of whether consent was given relates to a conversation with Wright by Officers McQueen, McRoberts, and then a federal attorney, Yeager, which took place between 9:45 and 10:00 P.M. on the evening of Wright's arrest. Officer McQueen testified that she "gave verbal permission" (Tr. 103) and that "she said for us to go ahead, that she had no objections." (Tr. 108). McQueen further testified that when he presented a written waiver of search to Wright she refused to sign it saying, "You don't need that, you've got my permission." (Tr. 103). This latter testimony is highly suspect, for the fact of presenting Wright with a written consent at this time is contradicted not only by Wright (Tr. 96), but also by his fellow officer, McRoberts (Tr. 113). McRoberts testified, "the interview was negative, all but verbal permission to search her residence." (Tr. 110). He further testified that when asked if a search could be made, she answered, "Yes, that she had nothing to hide" (Tr. 113). United States Attorney Yeager was not called by the government to testify. This alleged "consent" took place, it is agreed, at approximately 10:00 P.M. The search began immediately.

It is submitted that a finding of "consent" on these facts was clearly erroneous. Here the government had the burden of coming forward with evidence to establish "consent" clearly, unequivocally, and convincingly. This burden is indeed high, for waiver of constitutional rights is not lightly

considered. Channel v. U.S., 285 F2d 217 (C.A. 9th Cir. 1960); Judd v. U.S., 190 F2d 649 (C.A., D.C. 1951). The test of the government's case in establishing consent in such a situation has been clearly defined in a recent 9th Circuit Case, U.S. v. Page, 302 F2d 81 (9th Cir. 1962). There, the court laid down the following rules:

> "The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given'. There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. 'Courts indulge every reasonable presumption against waiver of fundamental constitutional rights'. Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact. The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." U.S. v. Page, supra, at 83-84.

While all the elements of implied duress or coercion are present here, the government has offered no evidence that there was "no coercion in fact". Further, the testimony offered by the government is not unequivocal, for the alleged statements of Miss Wright are entirely consistent with an expression of "false bravado", as pointed out in Channel. The government has offered no clear and positive testimony of the consent, but rather conclusory assertations and contradictory recollections. All the circumstances buttress the conclusion that if any consent was obtained it was contaminated by duress and coercion. Though Miss Wright was taken into custody at approximately 8:00 P.M., she is not alleged to have consented until approximately 10:00 P.M., even though a team had been

instructed to stand by her home to search it as soon as permission was granted. (Tr. 119). United States Attorney Yeager was not called to testify, although the nature of his training would have made him extremely sensitive to the nature of the alleged "consent", and his recollection thereby sharpened. All these circumstances, in addition to the admitted refusal of Miss Wright to sign a written waiver, command the court to indulge a "reasonable presumption against waiver of fundamental constitutional rights", as enjoined by this court in the Page case. This presumption has not been met with evidence. This finding of "consent" was clear error and should be reversed. Channel v. U.S., supra; Williams v. U.S., 263 F2d 487, 489-90 (C.A., D.C. 1959).

It is clearly established that the accused can assert the invalidity of this search as to Miss Wright and require that the evidence be suppressed. U. S. v. Jeffers, 342 U.S. 48 (1951); McDonald v. U.S., 335 U.S. 451, 458 (1948); Plazola v. U.S., 291 F2d 56, 63 (9th Cir. 1961). His standing to move to suppress under Rule 41(e) of Federal Rules of Criminal Procedure, here permitted by the court in the exercise of its discretion, is likewise clearly established. Jones v. U.S., 362 U.S. 257 (1960); Contreras v. U.S., 291 F2d 63 (9th Cir. 1961). The fact that the government wishes to prove his possession by the items secured, is sufficient to give the defendant "standing".

B. EVEN IF "CONSENT" OF WRIGHT COULD BE ESTABLISHED, IT COULD NOT DEFEAT DEFENDANT'S RIGHT

IN THE PREMISES AT 774 17TH STREET, TO BE SECURED AGAINST UNREASONABLE SEARCHES AND SEIZURES.

Even assuming the government could have made out the fact of consent by Dolores Jean Wright, such consent would not validate the search as to the defendant. As indicated above, the premises located at 774 17th Street, Fairbanks, Alaska, were jointly occupied by Dolores Jean Wright and the accused. The premises at the address consisted of a small house, including two bedrooms, a living room, kitchen, bathroom, back porch, and basement. About a week before the arrest, defendant had come to Fairbanks in pursuit of a business venture and had run into Miss Wright. Conversation developed that he needed a place to stay and arrangements were made with Wright for the defendant to occupy one of the bedrooms in the house. Apparently, he also had the use of other parts of the house, including the living room and bathroom. The bottle of milk sugar, Exhibit C, was found in the bathroom. The defendant was never requested to give any "consent" to the search of the premises, nor did he do so at any time (Tr. 89). Miss Wright, although indicted, was not on trial. Under these facts, the defendant has a right of privacy protected under the 4th Amendment of the United States Constitution, independent of that of Wright. This right was violated when the search took place without his consent, and without a valid search warrant having been

executed against him.

It is admitted that Wright had an unqualified right to occupy parts of the premises at 774 17th Street, and perhaps a qualified right to enter the rooms that had been made available to the defendant. But in accepting the use of the rooms in Wright's home, the defendant did not authorize her to consent on his behalf to a search of those rooms. In fact, it was not shown that Wright had authority to act for the defendant in any capacity. The officers could not take advantage of Wright's limited use of or right to enter the rooms extended to defendant. Chapman v. U.S., 365 U.S. 610 (1961); Henzel v. U.S., 296 F2d 650, 651 (5th Cir. 1961); Cola v. U.S., 22 F2d 742, 743 (9th Cir. 1927).

Further, this right of privacy is not based upon any peculiar possessory interest in the premises, but upon actual occupancy of the accused. As set forth by the court in the Chapman case:

> "It is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of the law, has been shaped by distinctions whose validity is largely historic. . . ."
>
> Chapman v. U.S., supra, 617.

See also U.S. v. Blok, 188 F2d 1019, 1021 (C.A., D.C. 1951). This development of the law of the right of privacy was anticipated early, and has been the law in this Circuit for some years. Klee v. U.S., 53 F2d 58 (9th Cir. 1931).

The court, in holding that its finding of consent was binding upon the defendant, relied upon two cases which are clearly distinguishable from the facts before us. Stein v. U.S., 166 F2d 851 (9th Cir., 1948), dealt with the authority of a woman to consent for her husband. The court was careful not to extend the argument to defendants other than her husband. U.S. v. Sferas, 210 F2d 69 (7th Cir. 1954) discusses the authority of a partner to authorize the search of partnership property. The statement is merely dictum, for there the defendant was held to have waived his right to suppress the evidence by failing to make a motion before trial. Once again, the case deals only with authority. As mentioned above, there is no question of authority in this case. Had Miss Wright assisted the officers in detaining the defendant's property against his wishes, she would have been guilty of larceny. The defendant's right of privacy is entitled to no less protection.

Objection to Exhibits C and D were raised by motion to suppress, made properly and timely (Tr. 86-129). Accordingly, Exhibits C and D should never have been admitted in evidence, and Exhibit C should never have remained before the jury. Without the weight of Exhibit C, it is doubtful if the jury would ever have returned a verdict of guilty on Count II, and a new trial should therefore be granted.

II. THE COURT ERRED IN ADMITTING EXHIBIT E, AND THE TESTIMONY RELATED THERETO, INTO EVIDENCE, IN THAT AS AN ITEM OBTAINED IN AN UNLAWFUL SEARCH OF THE DEFENDANT'S AUTO, IT WAS NOT ADMISSIBLE AGAINST HIM.

During the course of the trial, Exhibit E, consisting of $400.00 in 18 twenties and 4 tens, was admitted into evidence. The money was identified as that given to Geary to effect the purchase of narcotics. The evidence was linked to the defendant by testimony that it was recovered from the headlight section of his automobile. The automobile was taken into custody at the time of defendant's arrest, was impounded, and was never released. Admittedly, the search took place two or three days after the arrest (Tr. 13). No valid search warrant was ever issued or executed against the defendant as to this automobile or anything else. Defendant moved to suppress Exhibit E before trial, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, as the product of an unlawful search and seizure. The motion was denied. There is no question of the defendant's standing to make the motion, based on his proprietary interest in the car. The government relies upon the theory that search was reasonably incident to the arrest of the defendant. It is submitted that the admission of this exhibit is clearly erroneous and should be reversed.

Authority to make a search incident to a lawful arrest is limited not only to the confines under the immediate control of the defendant, but is also limited to a search contemporaneous with the arrest. Rent v. U.S., 209 F2d 893 (5th Cir. 1954); U. S. v. Stoffey, 279 F2d 924 (7th Cir. 1960). Cf. Shurman v. U.S., 219 F2d 282 (5th Cir. 1955).

Two or three days after the arrest is not "contemporaneous" with the arrest by any stretch of the language. The basis for the requirement is spelled out in the Stoffey case, where the court says:

> "The seizure of the car was not incidental to the arrest of the defendant. The arrest both in fact and in law was consummated before the car was seized. There was no risk of the car being driven away while a search warrant was being obtained. * * * It is unreasonable searches that are prohibited by the 4th Amendment (Citing cases). We are not here confronted with the arrest of defendant in his automobile. Neither are we confronted with a case where law enforcing officers find it necessary to make a search in a moving automobile or one which has been temporarily halted and which may be moved away by the occupant at any moment. The automobile here searched without a search warrant was not in movement and was not occupied by the defendant at the time of the search or at the time of his arrest. In fact, government agents had made it impossible for him to drive it away. Under these circumstances the search of his automobile was unreasonable." (U.S. v. Stoffey, supra, 928-29).

Clearly, then, Exhibit E was obtained in violation of the defendant's rights under the 4th Amendment of the United States Constitution. It should not have been received in evidence. Objection was raised to its admission by motion to suppress, made before trial (Tr. 4-14), and renewed upon its admission (Tr. 245). Without it, the jury would not have convicted the defendant on Count II of the indictment. The conviction should be reversed and a new trial granted.

III. THE COURT ERRED IN ADMITTING EXHIBIT D INTO EVIDENCE, THERE BEING NO EVIDENCE OFFERED TO LINK THE ITEMS TO THE DEFENDANT OR TO THE CRIME CHARGED: UNDER THE CIRCUMSTANCES OF THIS CASE, THE SUBSEQUENT WITHDRAWAL OF THIS EVIDENCE FROM THE JURY DID NOT CURE THIS ERROR.

In the course of the trial, Government's Exhibit D was

admitted into evidence, consisting of an eye dropper and needle obtained in a search of the premises at 774 17th Street. (Tr. 87,168). Later, a witness testified as to this exhibit that "a trace of morphine or heroin was in this specimen (Tr. 167). No evidence was offered to link this exhibit with the defendant or with the crime charged. At the close of the trial the court ruled that Exhibit D be stricken and the jury was instructed to disregard any testimony concerning it. It is respectfully submitted, however, that the error in admitting this exhibit over the defendant's objection was not cured by this subsequent withdrawal.

The effect of this exhibit, and the testimony surrounding it, was naturally to convince the jury of the defendant's knowledge of some sort of illegal narcotics activity being carried on, on the premises of 774 17th Street. They may well have reasoned from this that the defendant was in some sort of joint or constructive possession of the narcotics. From the instructions given them, it then followed that concealment had been made out if the defendant did not take some affirmative act of disclosure. The only other evidence of the presence of narcotics on the premises at 774 17th Street was the highly suspect testimony of Geary, yet by exposure to this exhibit, the jury was indelibly impressed with the apparent presence of narcotics on the premises. Under such circumstances, only a new trial before a new jury can correct the

error. Throckmorton v. Holt, 180 U.S. 552 (1901); Helton v. U.S., 221 F2d 338 (5th Cir. 1955). The conviction should be reversed and a new trial granted.

IV. CERTAIN INSTRUCTIONS GIVEN BY THE COURT WERE SO FAR UNRELATED TO THE ISSUES AND THE EVIDENCE OF THIS CASE AS TO CONFUSE AND MISLEAD THE JURY. WHEN CONSIDERED COLLECTIVELY, THESE ERRONEOUS INSTRUCTIONS INVITED A CONVICTION ON EVIDENCE WHICH WAS NOT SUFFICIENT IN LAW TO CONSTITUTE A CRIME UNDER TITLE 21, SEC. 174.

It is submitted that the giving of Instructions 9, 10, 12, and 13 by the Court, under the circumstances of this case, was prejudicial error. The instructions read to the jury were as follows:

Instruction No. 9:

"Although the verb 'conceal' ordinarily means to hide or keep from sight or view, the expression as used in the statute and the indictment here carries a broader meaning.

"The law imposes an internal revenue tax upon all legitimate narcotic drugs, and provides that revenue stamps evidencing payment of the tax 'shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof'. It is unlawful 'for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs . . . (is) prima facie evidence of a violation of (law) by the person in whose possession the same may be found', unless the person possessing the narcotic drugs has obtained them from a registered dealer, such as a pharmacist, upon prescription issued for legitimate medical uses by a physician or other registered and licensed person.

"Since the law imposes upon every person possessing a narcotic drug (other than upon legitimate medical prescription) the affirmative duty to keep

the narcotic drug in a container bearing revenue stamps evidencing payment of the tax, the wilful failure of a person who is in actual or constructive possession of any untaxed narcotic drug (other than upon legitimate medical prescription) to reveal to some Internal Revenue official the existence of such narcotic drug, amounts to a concealment within the meaning of the statute, even though such narcotic drug may not actually be hidden or kept from sight or view."

Instruction No. 10:

"The law recognizes two kinds of possession; actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

"A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

"The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

"If you find from the evidence beyond a reasonable doubt that the accused, either alone or jointly with others, had actual or constructive possession of the heroin described in the indictment, then you may find that such heroin was in the possession of the accused within the meaning of the word 'possession' as used in these instructions."

Instruction No. 12:

"In every crime there must exist a union or joint operation of act and intent.

"The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

"With respect to lesser offenses, if it be shown that a person has knowingly committed an act denounced by law as a crime, intent may be presumed

from the voluntary doing of the forbidden act.

"But with respect to major crimes, such as charged in this case, specific intent must be proved before there can be a conviction.

"Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

"A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent. (Emphasis supplied).

"An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason."

Instruction No. 13:

"Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issue as to intent the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

Instruction No. 10, given by the court, was error, in that it went beyond the evidence presented to the jury. It

covered both joint and constructive possession. There is no evidence of anything but actual and sole possession of narcotics by the defendant. The prejudicial nature of this instruction, its tendency to mislead the jury, can be shown when it is discussed in the context of Instructions 9, 12, and 13, also erroneous and prejudicial.

Instruction No. 9 covered a failure to report to an Internal Revenue official the possession of narcotics in the absence of an appropriate tax paid stamp. Such a situation was far afield from anything contained in the evidence of this case. Here there was no question of any failure to report to an agent of Internal Revenue, nor was there any evidence whatever in the testimony of the informant concerning the presence or absence of tax stamps or a prescription. There was no direct evidence at all as to any prescription from a physician, or the absence thereof, or as to any tax stamps. The defendant denied ever having any narcotics whatever. Nevertheless, under the terms of this instruction, the jury was told that such activities might constitute a "con cealment" of a narcotic drug. Since this was the very crime contained and alleged in Count II of the indictment, it might well be that the jury attempted to read some such factual situation into the evidence.

Instruction No. 12, dealt with the criminal intent. Though there was no issue as to intent, and if the testimony offered by the government was believed, intent was apparent,

the court went into necessary detail. A particularly misleading section is the following:

> "A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent. (Instruction No. 12. Emphasis supplied).

Similarly, Instruction No. 13, discussed aspects of the law of intent not at issue, if the testimony offered by the government was believed. Particularly misleading is the section which reads as follows:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.
>
> "In determining the issue as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which made a determination of the state of mind." (Instruction No. 13, emphasis supplied).

Considering all these instructions together, it is clear that the jury was led to believe that the government had made out their charge under Count II of the indictment, independent of the testimony of the informant. Count II charged the defendant with knowingly concealing and facilitating the transportation of narcotics. If the jury believed that the defendant had knowledge of the presence of narcotics, either on the premises or in the possession of someone with whom testimony had associated him, the jury

might have thought he was in some sort of joint or constructive possession of it and therefore under a duty to disclose the fact of its presence to a tax official. Since no such disclosure was asserted, the jury might have reasoned a concealment was made out, intentionally and in disregard of the law. Or again, the defendant admitted transporting the government informant to the point at which she was arrested, and found to be in possession of narcotics. The jury may well have reasoned that if the defendant knew of this, the charge of facilitation of transportation was made out.

The trouble with either of these interpretations of the evidence is that neither of them, independent of the government informant's testimony, makes out a prima facie case against the defendant. There is no evidence of "possession", within the meaning of 21 USC, Sec. 174, except that resting upon the credibility of the informant's testimony. Yet the government has relied upon the statutory presumption arising from 21 USC, Sec. 174, for it has offered no evidence either of illegal importation of the narcotics in evidence, or of defendant's knowledge of such illegal importation. The instruction permitted, in fact, invited, a conviction on Court II upon evidence which does not constitute a prima facie case under 21 USC, Sec. 174. Arellanes v. U.S., 302 F2d 603, 606-7 (9th Cir. 1962); Hernandez v. U.S., 300 F2d 114 (9th Cir. 1962). Cf. Gonzales v. U.S., 301 F2d 31 (9th Cir. 1962).

The effect of these instructions is emphasized by the fact that although a conviction was returned on Count II, the jury could reach no verdict on Count I. All of informant's testimony related to the sale or facilitation of sale alleged in Count I. As a matter of strict logic, the failure to reach a verdict on Count I negatives the fact of the defendant's possession. Conceding the law to be that inconsistent verdicts on various counts of an indictment is not reversible error, it is submitted that this is not a rule to be applied blindly. See eg. U.S. v. Maybury, 274 F2d 899 (2nd Cir., 1960). Here, it appears the court has permitted a conviction, notwithstanding the jury's disbelief of the witness upon whom the government's prima facie case rests.

The chief purpose of instruction to the jury is to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved. Bird v. U.S., 180 U.S. 356 (1901). Certainly, instructions to the jury should not tend to mislead them and an instruction is erroneous which is misleading or well-calculated to mislead, or which will tend to confuse the jury in the consideration of the issues in the case. One of the most obvious situations tending to mislead a jury, is to give them an instruction not based upon competent evidence in the case, or where the instruction implies the existence of facts of which there is no evidence or which have not been proved. The giving of the instructions discussed above was

prejudicial error. Exception was taken to the giving of each of them. The defendant is entitled to a trial to a jury properly instructed. The conviction should be set aside and a new trial granted to the defendant. Quercia v. U.S., 289 U.S. 466, 470 (1932); U. S. v. Breitling, 61 US. 252 (1858).

V. THE COURT ERRED IN GIVING ITS INSTRUCTION RESPECTING THE CREDIBILITY OF THE DEFENDANT'S TESTIMONY. THE TENDENCY OF THE INSTRUCTION TO SINGLE OUT AND DISCREDIT THIS TESTIMONY EXCEEDED THE BOUNDARIES OF FAIR COMMENT ON THE EVIDENCE PROPERLY WITHIN THE PROVINCE OF THE TRIAL JUDGE.

It is submitted that the giving of Instruction No. 21 by the court, under the circumstances of this case, was prejudicial error. Instruction No. 21 read as follows:

> "The law makes the defendant in a criminal action a competent witness. In determining his credibility, you have a right to take into consideration the fact that he is the defendant and is interested in the outcome of this trial. This interest is of a character possessed by no other witness and is therefore a matter which may affect the weight and credit to be given his testimony, and one which may be considered by you in determining what weight you will give his testimony in connection with all the other evidence."

Under some circumstances, the giving of Instruction 21 might not be error. However, in a close case, such as the present one, where the guilt or innocence of the defendant hung in the balance on the question of whether or not the jury believed the testimony of the witness Geary, or the testimony of the defendant, it is respectfully submitted that the giving of this instruction was error. The instruction singles out the testimony of the defendant, distinguishes it from the testimony of all other witnesses, and in effect, invites the jury to disregard it. It is a bad instruction and should not have been given.

In Hicks v. United States, 150 US 442 (1893), the trial court had given an instruction concerning the testimony of

the accused as follows:

> "The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you are to consider it in the light of the other evidence, in the light of the other facts . . .. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement . . . Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence." (p. 450-1).

The Court in Hicks, in the course of granting a new trial, said:

> "It is not easy to say what effect this instruction had upon the jury. If this were the only objectionable language contained in the charge, we might hesitate in saying that it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of an accused person. Still it must be remembered that men may testify truthfully although their lives hang in the balance, and the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose slightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defected by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law." (p. 452; emphasis is the Court's).

Certainly, it must be admitted that there are many cases holding that the giving of such an instruction as was given in the present case is not reversible error. However,

in many cases the giving of such an instruction is not viewed with particular approval, and it is respectfully submitted that the giving of such an instruction, under the circumstances of this case, where the decision of the jury rested almost completely on the testimony of the two adverse witnesses, was in fact erroneous. Quercia v. U.S., 289 U.S. 466 (1932).

VI. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF PLAINTIFF'S CASE, AND RENEWED AT THE CLOSE OF ALL THE EVIDENCE. A REVIEW OF THE EVIDENCE REVEALS THAT A PROPER EVALUATION OF THE EVIDENCE ESTABLISHES ITS INADEQUACY TO FORECLOSE A REASONABLE DOUBT OF DEFENDANT'S GUILT, AND THE QUESTION SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

Aside from the very serious problems raised by the searches and seizures of evidence, discussed above, the evidence as a whole left so many unfilled gaps as to have justified the court in granting the motion for judgment of acquittal made by the defendant.

The testimony of Hazel Geary could only be characterized as unreliable in the extreme. Geary had previously been convicted of grand larceny, and at the time of trial was at liberty on bond on two other felony charges, forgery and possession of narcotics. She was an admitted narcotics addict and life-long prostitute. Aside from matters of impeachment, her testimony contained a number of discrepancies and improbabilities. The case against the appellant, with the exception of the testimony of Geary, was wholly circumstantial. Briefly put, the government sought to establish the guilt of Burge by proving that (1) Geary was "clean" of narcotics when she went to the Wright house in the morning, bearing marked money; (2) at the house, Geary had access to Burge; (3) after leaving the house, Geary was found with narcotics which she claimed she got from Burge; and (4) the marked money was found several days later concealed about

Burge's automobile.

None of the links in this chain of circumstances, however, remains intact when all the evidence is examined. Geary stopped at the Model Cafe for ten or fifteen minutes after she left the police station, before going to the Wright house, and was unobserved during this period. At the Wright house, she had access to Dolores Jean Wright, Jackie Bell, and an unknown cab driver, as well as appellant. Bell had the reputation of being a narcotics pusher, and Wright was a user.

The bottle of heroin which she described as being used by Burge to measure out narcotics at the house was never found, although the police had the house surrounded at all times. It was not in Burge's possession, nor in his vehicle, nor was it in the house. Who removed it from the house, and who brought it there?

The marked money was eventually found, as noted above, behind the right headlight of Burge's automobile. It was discovered as a result of an annonymoustelephone tip to Special Agent Carpenter at a time when Burge was in custody. Whoever made that phone call was rather obviously the person who placed the money behind the headlight, and it could not have been the appellant. No trace of narcotics was ever found on Burge or in his possession, and the same was true as to the marked money. Burge, a long-time Alaska teamster, was the only one of the sordid cast of this proceedings who had no criminal background and no previous connection

with narcotics in any way. Under all of the circumstances, the court erred in refusing to grant the defendant's motion for acquittal.

CONCLUSION

The items of physical evidence constituting the exhibits discussed in this brief were products of unlawful searches and seizures and should never have been admitted against the appellant. The chain of circumstances was incomplete. The court erred in each particular specified in this brief, and the judgment should be reversed.

Respectfully submitted,

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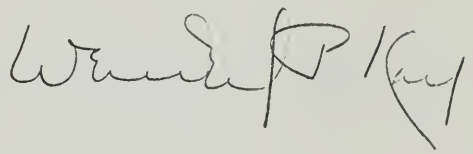
By: 

APPENDIX OF EXHIBITS

PLAINTIFF'S EXHIBITS

	Identified	Offered	Admitted	Rejected
A	83	163	163	
B	83	165	165	
C	83	166	166	
D	83	167	168	326-7
E	83	237	238	
F	173	177	177	

DEFENDANT'S EXHIBITS

1	187	187	187	

CERTIFICATE

I certify that, in connection with the preparation f this brief, I have examined Rules 18 and 19 of the nited States Court of Appeals for the Ninth Circuit, nd that, in my opinion, the foregoing brief is in full ompliance with those rules.

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